Office-Supreme Court, U.S.
FILED
OCT 22 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 82-322 and 82-329

In the Supreme Court of the United States

OCTOBER TERM, 1982

CARMINE ROMANO, PETITIONER

v.

UNITED STATES OF AMERICA

PETER ROMANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1954 prohibits a trustee of a union pension fund from accepting television sets from a bank as gifts for opening accounts with pension fund assets.

2. Whether the district court properly instructed the jury on the element of willfulness under the Taft-Hartley Act, 29 U.S.C. 186.

3. Whether petitioner Carmine Romano's convictions under the RICO statute, 18 U.S.C. 1962, violated the Due Process Clause of the Fifth Amendment, because the alleged "racketeering activities" included criminal offenses not requiring mens rea.

4. Whether the district court deprived petitioners of their right to a public trial by locking the courtroom while it charged the jury.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 2

Argument 6

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Chandler v. *Florida*, 449 U.S. 560 11

Gannett Co. v. *DePasquale*, 443 U.S. 368 ..... 10, 11

Korholz v. *United States*, 269 F.2d 897, cert. denied, 361 U.S. 929 9

McKibben v. *State*, 187 Ga. 651, 2 S.E.2d 101 11

Nixon v. *Warner Communications, Inc.*, 435 U.S. 589 11

People v. *Buck*, 46 Cal. App. 558, 116 P.2d 160 11

People v. *Micalizzi*, 223 Mich. 580, 194 N.W. 540 11

Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555 ..... 10, 11

State v. *Gibb*, 303 N.W.2d 673 11

State v. *Lawrence*, 167 N.W.2d 912 12

Page

Cases—Continued:

United States v. *Boylon*, 620 F.2d 359, cert. denied, 449 U.S. 833 8

United States v. *Culbert*, 435 U.S. 371 7

United States v. *Inciso*, 292 F.2d 374, cert. denied, 368 U.S. 920 8

United States v. *Kaye*, 556 F.2d 855, cert. denied, 434 U.S. 921 8

United States v. *Keegan*, 331 F.2d 257, cert. denied, 379 U.S. 828 8

United States v. *Lanni*, 466 F.2d 1102 8

United States v. *Overton*, 470 F.2d 761, cert. denied, 411 U.S. 909 8

United States v. *Pecora*, 484 F.2d 1289 8

United States v. *Ricciardi*, 357 F.2d 91, cert. denied, 384 U.S. 942 8

United States v. *Ryan*, 350 U.S. 299 7

United States v. *Scotto*, 641 F.2d 47, cert. denied, 452 U.S. 961 8

United States v. *Simpson*, 561 F.2d 53 8

United States ex rel. Orlando v. *Fay*, 350 F.2d 967, cert. denied, 384 U.S. 1008 11

Page

Constitution and statutes:

United States Constitution:

Fifth Amendment (Due Process Clause) 9

Sixth Amendment 10

Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* :

18 U.S.C. 1961(1)(C) 9

18 U.S.C. 1962(c) 2, 5

18 U.S.C. 1962(d) 2

Taft-Hartley Act, 29 U.S.C. 141 *et seq.* :

29 U.S.C. 186 ..... 7, 8, 9

29 U.S.C. 186(b)(1) 2, 5, 9

18 U.S.C. 2 2

18 U.S.C. 1503 2

18 U.S.C. 1623 2

18 U.S.C. 1954 ..... 2, 5, 6, 7, 9

Miscellaneous:

108 Cong. Rec. (1962):

p. 1730 6

p. 1924 6

H.R. Rep. No. 998, 87th Cong., 1st Sess. (1961) 6

S. Rep. No. 908, 87th Cong., 1st Sess. (1961) 6, 7

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-322

CARMINE ROMANO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 82-329

PETER ROMANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a)[1] is reported at 684 F.2d 1057.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1982. The petitions for a writ of certiorari were filed on August 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

---

[1]References are to the appendix in No. 82-322.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner Carmine Romano was convicted on one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c) (Count 2); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d) (Count 1); 12 counts of misusing union pension funds, in violation of 18 U.S.C. 1954 and 2 (Counts 3-14); 46 counts of aiding and abetting the receipt of illegal labor payments, in violation of the Taft-Hartley Act, 29 U.S.C. 186(b)(1), and 18 U.S.C. 2 (Counts 15-60); and one count of personally receiving an illegal labor payment, in violation of 29 U.S.C. 186(b)(1) (Count 92). Petitioner Peter Romano was convicted on the RICO counts (Counts 1 and 2); on 31 Taft-Hartley counts (Counts 61-91); on one count of perjury before a grand jury, in violation of 18 U.S.C. 1623 (Count 166); and on one count of obstructing justice, in violation of 18 U.S.C. 1503 (Count 167).

Carmine Romano was sentenced to concurrent 12-year terms of imprisonment on Counts 1 and 2; one year's imprisonment on Counts 3 to 14, to be served consecutively to each other but concurrently with the sentence on Counts 1 and 2; and six months' imprisonment on Counts 15 to 24, 34 to 60, and 114, to be served consecutively to each other but concurrently with the sentences on the other counts. In addition, he was fined $10,000 on each of Counts 1 and 2. Peter Romano was sentenced to concurrent 18-month terms of imprisonment on Counts 1 and 2; six months' imprisonment on Counts 61 to 91, to be served concurrently with each other and with the sentences on Counts 1 and 2, and five years' imprisonment on Counts 166 and 167, all but six months of which were suspended, to be served

concurrently with the sentences on the other counts. In addition he received a five-year term of probation. The court of appeals affirmed (Pet. App. 1a-18a).

1. The evidence as summarized in the opinion of the court of appeals showed as follows. Petitioner Carmine Romano was the Secretary-Treasurer of Local 359 of the United Seafood Workers Union in New York City from May 1974 until May 1980, when his brother, petitioner Peter Romano, succeeded him. Carmine then assumed a newly created position as the Executive Administrator of the Fulton Fish Market Welfare and Pension Trust Funds, and thus he became a trustee of the Union's pension fund (Pet. App. 6a).

In 1975, the New York Wholesale Fish Dealers Association asked Carmine for assistance in stopping thefts that were plaguing the Fulton Fish Market. Shortly thereafter, Carmine created a watchmen's service called the Fulton Patrol Service. Between November 1975 and October 1981, the Patrol Service collected over $644,000 from the wholesale fish merchants (Pet. App. 6a-7a).

The Patrol Service's success in reducing the incidents of theft was due more to the influence of Carmine and his co-conspirators over the thieves than to the quality of the watchmen's service. For instance, John Pontebbi, who ran the Patrol Service on a day-to-day basis, hired Anthony O'Connor because he thought O'Connor knew who the thieves were and thus could recover the stolen fish (Pet. App. 7a).[2]

---

[2]Carmine's brother Vincent was hired for the same reason. Moreover, a number of watchmen listed on the payroll did not exist (though their checks were cashed), one of the watchmen was a kleptomaniac who stole fish from the market himself, and another watchman who did patrol the market knew of only one other watchman who actually worked for the Patrol Service (*id.* at 7a).

In addition, the union systematically collected cash "Christmas payments" from the wholesalers each December from 1975 through 1979. The payments were ordinarily solicited and collected by other businessmen, who told the fish merchants that the money was for "the boys at the union" (Pet. App. 8a). Many merchants, who believed the payments were illegal, would not have made them but for the request on behalf of petitioners (*ibid.*).[3]

The union also extracted money from the Fulton Market merchants through the rental for $25 per month of cardboard union signs. The businessmen who rented these signs did so because everyone else was doing it and in spite of the fact that many of them believed the rentals were illegal. Almost no merchant believed the signs were worth $25 per month (Pet. App. 9a).

In addition, Carmine and his co-conspirators profited through the misuse of union welfare and pension funds. Between 1974 and 1979, Carmine, as trustee of the pension fund, directed the deposit of over $168,000 of the pension fund's money into the Republic National Bank, keeping for himself and his co-conspirators over $10,000 worth of color television sets given by the bank as gifts to the sponsors of the new accounts. The sponsors could have taken the gifts in the form of cash and contributed the money to the pension fund, but did not do so. Moreover, depositing the money in the Republic National Bank instead of a commercial bank cost the pension fund approximately $10,000 in interest. Neither Carmine nor the other trustees disclosed in the

---

[3]Occasionally, the union officers were directly involved in collecting the "Christmas payments." In December of 1977, either Carmine or Anthony O'Connor requested the president of Commercial Fish Co., Philip Bartone, to drop his Christmas payment off at the T&S Fish Co. In December 1978, an employee of Booth Fisheries personally delivered Booth's $300 "Christmas present" to Carmine (*id.* at 8a-9a).

minutes of the pension fund that they had received these TV sets, nor did they disclose the gifts in the annual report to the beneficiaries of the pension fund or in reports required to be filed with the Department of Labor (Pet. App. 10a).

When the district court prepared to deliver its instructions to the jury, it ordered the courtroom doors locked, over petitioners' objection, in order to eliminate unnecessary distractions. No one in the courtroom was required to leave, and no one tried to enter the courtroom during the time the doors were locked (Pet. App. 17a).

2. The court of appeals affirmed petitioners' convictions (Pet. App. 1a-18a). It held that 18 U.S.C. 1954, which prohibits a trustee of a pension fund from receiving "any" gift "with intent to be influenced with respect to, any" decisions concerning the pension fund was violated by petitioner Carmine Romano's receipt of television sets in return for approving the deposit of the union fund's assets in Republic National Bank accounts (Pet. App. 12a-14a). The court also rejected as "frivolous" (*id.* at 16a n.6) petitioners' claim that it would violate due process to convert their misdemeanor Taft-Hartley violations (29 U.S.C. 186(b)(1)), which did not require proof of mens rea,[4] into a felony on the basis of the RICO statute, 18 U.S.C. 1962(c). Finally, the court held that closing the courtroom doors during the instructions was a "reasonable limitation to ensure that the jury was properly instructed without distraction" (Pet. App. 17a).

---

[4]Petitioners acknowledged in their appeal briefs that the Second Circuit previously had held in a long line of cases (see page 8, *infra*) that 29 U.S.C. 186(b)(1) does not require proof of criminal intent, but they preserved this issue by requesting the court of appeals to reconsider its decisions (82-1052 App. Br. 59; 82-1054 App. Br. 42). The court of appeals did not, however, discuss this issue in its opinion.

ARGUMENT

1. Petitioner Carmine Romano contends (82-322 Pet. 7-16) that his receipt of television sets from the Republic National Bank as gifts for opening accounts on behalf of the union pension fund fell outside the scope of 18 U.S.C. 1954. This claim is without merit.

Section 1954 prohibits a pension fund trustee, which petitioner Carmine Romano was, from receiving "any * * * gift * * * with intent to be influenced with respect to, any of the actions * * * relating to any question or matter concerning such plan * * *." Apparently conceding that his actions violate the literal meaning of Section 1954 (Pet. 8), petitioner contends that the legislative history of the statute indicates that Congress was concerned with kickbacks and that gifts-for-deposit, which are offered on a nonpreferential basis to all depositors, are not kickbacks.

To be sure, kickbacks to pension fund trustees were the main concern of Congress in enacting Section 1954. See S. Rep. No. 908, 87th Cong., 1st Sess. 4-5, 11 (1961); 108 Cong. Rec. 1730 (1962) (remarks of Rep. Roosevelt). But the legislative history reveals that Congress intended to reach "other conflict-of-interest payments" (H.R. Rep. No. 998, 87th Cong., 1st Sess. 7 (1961), and to establish "[f]ederal criminal sanctions for violations of trust." 108 Cong. Rec. 1924 (1962) (remarks of Sen. McNamara). Consistent with this intent was Congress' use of very broad language to describe the activities prohibited by the statute. Petitioner Carmine Romano points to nothing in the legislative history that indicates that Congress did not intend "to make punishable all conduct falling within the reach of the

statutory language." *United States* v. *Culbert*, 435 U.S. 371, 377 (1978).[5]

2. Petitioners next contend (82-322 Pet. 16-19; 82-329 Pet. 2 n.1) that the district court improperly instructed the jury on the element of willfulness under the Taft-Hartley Act, 29 U.S.C. 186. The district court instructed the jury that "the government need not prove that the defendant knew about the Taft-Hartley Act or acted with a bad purpose or a specific purpose to violate the statute" (Tr. 1512-1513). Petitioner argues that the court erred in failing to instruct the jury that it was required to find that petitioner knew his actions were unlawful or that he acted with a reckless disregard of their lawfulness.

In *United States* v. *Ryan*, 350 U.S. 299, 305 (1956), this Court reviewed the legislative history of Section 186 and observed that it is "a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative." Subsequently, the Second Circuit has ruled in a series of cases that Section 186

---

[5]Petitioner's reliance (82-322 Pet. 14) on a letter from the Department of Justice to Congress during the latter's consideration of Section 1954 is misplaced. See S. Rep. No. 908, 87th Cong., 1st Sess. 15-16 (1961). Although the Department did express concern about applying the statute to "de minimis business or social gratuities" (*id.* at 16), the court of appeals correctly found that "the receipt of over $10,000 worth of color television sets cannot be deemed a 'de minimis business or social gratuit[y]' " (Pet. App. 14a).

Petitioner further argues (82-322 Pet. 15-16) that because Section 1954 punishes the donor as well as the recipient of the "gift," the court's construction of the statute could make bankers "criminally liable for the widespread use of nonpreferential gifts-for-deposit." Petitioner overlooks, however, that it was the receipt of the television sets *for his own use* and his failure to turn them over to the pension fund that violated Section 1954. Accordingly, a banker would be liable under the statute only if he knew that a pension fund trustee intended to keep the "gift" for himself.

does not require proof of knowledge that the conduct is illegal, and has approved the substance of the instructions given by the district court. This Court has consistently declined to review those decisions. See *United States* v. *Overton*, 470 F.2d 761, 767 (2d Cir. 1972), cert. denied, 411 U.S. 909 (1973); *United States* v. *Ricciardi*, 357 F.2d 91, 100 (2d Cir.), cert. denied, 384 U.S. 942 (1966). See also *United States* v. *Scotto*, 641 F.2d 47, 55 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981); *United States* v. *Boylan*, 620 F.2d 359, 361-362 (2d Cir.), cert. denied, 449 U.S. 833 (1980). Nothing in the present case makes it more deserving than those cases of this Court's consideration.[6]

Notwithstanding petitioner's assertion (82-322 Pet. 17-19), the decision below does not conflict with holdings of the Seventh and Tenth Circuits. Any contrary suggestion in the language of the Seventh Circuit's decision in *United States* v. *Inciso*, 292 F.2d 374, 380, cert. denied, 368 U.S. 920 (1961), has been disapproved by the later decision of that court in *United States* v. *Keegan*, 331 F.2d 257, 261-262, cert. denied, 379 U.S. 828 (1964), which held that in a prosecution under 29 U.S.C. 186, the jury need not be instructed that the defendant must have acted with knowledge of the law. The *Keegan* court thus approved an instruction that "[t]he word 'knowingly' * * * does not require * * * that there be any knowledge or awareness that such act or omission is in fact prohibited by law." 331 F.2d at 261. Accordingly, the instruction given here almost certainly would be acceptable in the Seventh Circuit.[7]

---

[6]The Third Circuit is squarely in agreement with the Second Circuit's interpretation of 29 U.S.C. 186. See *United States* v. *Pecora*, 484 F.2d 1289, 1294 (3d Cir. 1973); *United States* v. *Lanni*, 466 F.2d 1102, 1110 (3d Cir. 1972).

[7]Petitioner Carmine Romano errs in suggesting that either *United States* v. *Kaye*, 556 F.2d 855, 863-864 (7th Cir.), cert. denied, 434 U.S. 921 (1977), or *United States* v. *Simpson*, 561 F.2d 53, 61-62 (7th Cir.

In *Korholz* v. *United States*, 269 F.2d 897, 903 (10th Cir. 1959), cert. denied, 361 U.S. 929 (1960), the Tenth Circuit termed as "accurate" an instruction that required the jury to find either specific intent to violate Section 186 or reckless disregard for the law, but the court did so in the course of affirming a conviction based on the more stringent instruction. Since the instruction approved there was favorable to the defendants, the court was not called upon to decide whether such an instruction was necessary. Clearly a holding that the charge requested by a defendant was not prejudicial to him is a far cry from a holding that such a charge is necessary. Accordingly, there is no reason to assume the Tenth Circuit would reach a result different from the holding below in a case in which the substantive standard for willfulness was contested by a defendant as inadequate.

3. The "racketeering activities" upon which petitioner Carmine Romano's RICO convictions were predicated included Taft-Hartley violations, 29 U.S.C. 186(b)(1). Petitioner contends (82-322 Pet. 19-21) that Taft-Hartley violations may not, consistent with the Due Process Clause of the Fifth Amendment, serve as predicate acts of racketeering because they contain no mens rea element.[8]

The RICO charges against petitioner, however, were predicated on several violations of 18 U.S.C. 1954, as well as on the Taft-Hartley violations. Since the jury convicted petitioner on the substantive counts charging the violations of Section 1954, it is clear that it believed petitioner

---

1977), supports his position. The only question in *Kaye* was the sufficiency of the evidence. The opinion does not set forth the district court's charge, but expressly restates the holding in *Keegan* on this point. *Simpson* did not involve Section 186 at all.

[8]Petitioner does not dispute that under 18 U.S.C. 1961(1)(C) " 'racketeering activity' means * * * any act which is indictable under title 29, United States Code, section 186 * * *."

committed at least two acts of racketeering apart from the Taft-Hartley offenses. Accordingly, even if petitioner were correct on the merits, his RICO convictions would not be affected.

In any event, petitioner's claim is unfounded. The district court instructed the jury that to be guilty of a substantive RICO offense a defendant must act "wilfully" (Tr. 1556) and "with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law" (Tr. 1522-1523, 1524-1525, 1568-1569). The court similarly instructed that a defendant could not be found guilty of conspiracy unless, "with an understanding of the unlawful character of a plan, [he] knowingly and wilfully joins in an unlawful scheme" (Tr. 1561-1562). Moreover, the court clearly explained to the jury the difference between the intent required to violate the Taft-Hartley Act and the "criminal intent" necessary to violate or conspire to violate the other offenses charged (Tr. 1512-1513, 1522-1523, 1524-1525, 1568-1569). It is therefore simply not true that the inclusion of Taft-Hartley offenses as predicate acts of racketeering enabled the jury to convict petitioner on the RICO counts without a finding of criminal intent. Accordingly, petitioner's claim must fail.

4. Petitioners contend (82-322 Pet. 22-24; 82-329 Pet. 3-10) that the closing of the courtroom doors during the district court's charge to the jury violated their right to a public trial in violation of the Sixth Amendment. This contention is frivolous.

The Sixth Amendment, of course, guarantees the accused a right to a public trial. See, *e.g.*, *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 580 (1980) (opinion of Burger, C.J.); *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 382-384 (1979). But "[t]he requirement of a public trial is satisfied by the opportunity of members of the public and

the press to attend the trial and to report what they have observed." *Chandler* v. *Florida*, 449 U.S. 560, 569 (1981), quoting *Nixon* v. *Warner Communications, Inc.*, 435 U.S. 589, 610 (1978). Here, any member of the public or press who wished to observe the charge to the jury was allowed access to the courtroom. In fact, several members of the public were in the courtroom throughout the jury charge, and no one was actually denied entrance to the courtroom (Pet. App. 17a).

Moreover, to the extent that the practice of closing the courtroom during instructions implicates the Sixth Amendment at all, it is apparent that the Court's order was a reasonable limitation on courtroom traffic and noise designed to eliminate distraction of the jury during the critical charging period. As the Chief Justice recently observed in *Richmond Newspapers, Inc.* v. *Virginia*, *supra*, 448 U.S. at 581-582 n.18: "Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, see, *e.g.*, *Cox* v. *New Hampshire*, 312 U.S. 569 (1941), so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial * * *. It is far more important that trials be conducted in a quiet and orderly setting than it is to preserve that atmosphere on city streets." See also *Gannett Co.* v. *DePasquale*, 443 U.S. at 388 n.19 (trial court has broad discretion to control spectators in courtroom); *United States ex rel. Orlando* v. *Fay*, 350 F.2d 967 (2d Cir. 1965), cert. denied, 384 U.S. 1008 (1966).[9] The decision

---

[9]The state cases upon which petitioner Peter Romano relies do not aid his cause. In *McKibben* v. *State*, 187 Ga. 651, 2 S.E.2d 101 (1939), *People* v. *Buck*, 46 Cal. App. 558, 116 P.2d 160 (1941), and *State* v. *Gibb*, 303 N.W.2d 673 (Iowa 1981), the courts rejected claims similar to petitioners' claim here. In *People* v. *Micalizzi*, 223 Mich. 580, 194 N.W. 540 (1923), one of the defendant's attorneys was among those excluded

to close the courtroom doors for a short period to assist the jury is reasonable and raises no issue warranting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

OCTOBER 1982

---

from the courtroom during the reading of the instructions to the jury. In *State* v. *Lawrence*, 167 N.W.2d 912 (Iowa 1969), the courtroom was completely emptied of spectators before the instructions were read.

Nor is Peter Romano aided by his telephonic survey (82-329 Pet. 8-10). That approximately half of the jurisdictions in the country do not close the courtroom during the jury charge—assuming such is the case—does not in any way suggest that those jurisdictions interpret the Sixth Amendment as prohibiting such action.